United States Court of Appeals

for the Second Circuit

RESPONDENT'S BRIEF

75-4155

United States Court of Appeals

FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

COLUMBIA UNIVERSITY,
Respondent.

ON CROSS MOTION FOR AN ORDER DENYING ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE RESPONDENT

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BRIEF OF RESPONDENT

Statement of the Case

Upon an unfair labor practice charge filed on February 15, 1974, the Regional Director of the National Labor Relations Board ("Board"), Second Region, issued a complaint against The Trustees of Columbia University in the City of New York ("Columbia") alleging that Columbia had unlawfully discharged two employees, Drucilla Cornell and Muriel Hirschfeld, in violation of Section 8(a)(1) of the National Labor Relations Act ("Act")

After a hearing upon said complaint, Administrative Law Judge Morton D. Friedman, issued a Decision dated

August 23, 1974 finding that both of said discharges violated Section 8(a)(1) of the Act.

On May 22, 1975, the Board issued its Decision and Order reversing the Administrative Law Judge with respect to the discharge of Hirschfeld but sustaining his decision with respect to the discharge of Cornell. 217 NLRB No. 174.

The Board has petitioned this Court for enforcement of its Order and Columbia has filed a cross petition for an Order denying enforcement of the Board's Order.

Summary Statement of Facts

The facts in this case are in sharp dispute.

In summary, two telephone operators, Drucilla Cornell and Muriel Hirschfeld, allege that on January 21, 1974, they began a series of concerted activities, including an attempt to organize a grievance committee to speak for the employees in Columbia's telephone room, that the supervisor of the telephone room, Onnie Lawton, became aware of their activities and on January 23, 1974 discharged both because of their activities.

The supervisor, Lawton, testified that she had decided to discharge Hirschfeld prior to the commencement of any alleged concerted activities, that the action taken against Cornell was attributable solely to Cornell's improper behavior, absence from her work station and refusal to obey orders on January 23, 1974, and that Lawton had no knowledge of any alleged concerted activities on the part of either Hirschfeld or Cornell at the time in question, except that Lawton knew that Cornell had posted a notice concerning employee rights on the bulletin board in the telephone room.

Other employee witnesses contradicted Cornell and Hirschfeld in several respects and there was no clear corroboration of their testimony. However, the Administrative Law Judge found that Lawton had discharged both because of their alleged concerted activities.

The Board reversed the Administrative Law Judge's finding that Hirschfeld had been discharged for concerted activities but affirmed his finding with respect to Cornell.

Issues Presented and Columbia's Position

It is Columbia's position that the factual findings of the Administrative Law Judge are not supported by substantial evidence considering the record as a whole. Accordingly, the disputed facts are discussed in depth in the Argument in this Brief in Points I through VI.

It is also Columbia's position that the Board's Order is in err as a matter of law to the extent that it relies upon NLRB v. Weingarten, Inc., 420 U.S. 251 (1975).

It is also Columbia's position that, assuming arguendo that the Board's Order is enforced, it should be modified because it is too broad under the circumstances of this case.

ARGUMENT

POINT I - GENERAL

THE ADMINISTRATIVE LAW JUDGE ERRED BY USING UNEVEN AND INCONSISTENT STANDARDS IN EVALUATING EVIDENCE AND IN IGNORING OR ARTIFICIALLY HARMONIZING CONTRADICTORY EVIDENCE

It is well established that in the ordinary case questions of fact are to be determined by the jury, trial judge or hearing officer who has the benefit of personally observing the witnesses and appraising their testimony first hand. However, the mere statement of an Administrative Law Judge that his credibility determinations were based upon the demeanor of the witnesses does not bind an appellate court where the decision appealled from shows that the Judge making the credibility findings obviously evaluated the testimony of the various witnesses by uneven and inconsistent standards, and ignored or artificially harmonized contradictory evidence. It is respectfully submitted that the Administrative Law Judge erred in the important specific findings set forth infra in Points II, III, IV, V, VI and X. NLRB v. Plastics Products, 354 F. 2d 66 (6th Cir. 1965); NLRB v. Southern Materials Co., 345 F. 2d 240 (4th Cir. 1965); NLRB v. Daniels Construction Co., 332 F. 2d 791 (4th Cir. 1964); NLRB v. Audio Industries, Inc., 313 F. 2d 858 (7th Cir 1963); NLRB v. Florida Steel Corp., 308 F. 2d 931 (5th Cir. 1962).

POINT II

THE ADMINISTRATIVE LAW JUDGE ERRED IN FINDING THAT ON JANUARY 21 LAWTON MADE CHANGES IN THE WORK RULES WHICH RESULTED IN GENERAL EMPLOYEE DISSATISFACTION WITH LAWTON'S SUPERVISORY METHODS

Both Hirschfeld and Cornell testified that on January 21 supervisor Lawton announced certain changes in the work rules to them during a meeting in Lawton's office. It is not alleged that Lawton made these changes in retaliation against any employee or for any unlawful reason. Rather, Cornell and Hirschfeld depicted these changes as new "petty" rules (A.164) [1/] which offended the entire employee complement and sparked an alleged flurry of concerted activity during the next few days, resulting directly in their discharges on January 23.

The Administrative Law Judge found that the entire staff of telephone operators actively discussed these petty new rules, and during these discussions Cornell discoursed on the rights of employees under the Act, advised the other employees that Cornell had been a member of a grievance committee in a California bank and, after all this, the other operators "pretty much" decided that

1/ The abbreviation "A" followed by a number refers to the page of the Appendix in this case.

Cornell would speak to Lawton about the employees' "Grievances". (A.16, A.18)

Lawton emphatically denied that she had made any changes in the work rules, petty or otherwise. (A.32-33)

The Administrative Law Judge says that the determination of the truth with regard to this alleged beginning point of employee dissatisfaction is "vital to the resolution of credibility of Lawton's testimony as contrasted with the testimony of Hirschfeld and Cornell." (A.33) It is respectfully submitted that the Administrative Law Judge's decision shows on its face that he failed to properly consider the evidence on this point, which by his own statement became the cornerstone of his general credibility findings.

First, Cornell and Hirschfeld testified that Barbara Joyce, another telephone operator, actively participated in the discussions of January 21 and 22 and commented that "she was a grown woman and had been an operator long enough to know her job and did not need to be told when to say "please" and "thank you". (A.16, A.81, 82, 162) Barbara Joyce was called to testify by the Board's general Counsel but she did not make any mention whatsoever about the petty new rules. (A.33) The Administrative Law Judge says that this is "strange" (A.33) but otherwise ignores the inconsistency.

Second, Cornell testified that Marian Lloyd, another telephone operator, participated in the discussions on January 21 and even warned Cornell to be careful. (A.29) Lloyd denied that she had had any kind of discussion with Cornell or Hirschfeld on January 21 concerning grievances. The Administrative Law Judge comments that Lloyd's contradiction of Cornell is "among the imponderables" in the case and, with this comment, ignores the contradiction. (A.30)

Third, Betsy Reed, a clerk typist, alleged by Cornell to have been present during the conversation (A.81), denied that she had ever heard any discussion concerning work rule changes or a grievance committee on January 21 (A.155) The Administrative Law Judge found Reed to be a "reliable" witness (A.15) and placed considerable emphasis on another portion of Reed's testimony which he regards as detrimental to Columbia's defense. Nevertheless, the Administrative Law Judge totally ignored Reed's contradiction of Cornell with respect to the alleged discussions on January 21.

Fourth, Roxanna Brandao, the assistant chief operator of the telephone room, corroborated Lawton's testimony that there were no changes in the work rules, petty or otherwise, during the entire period of time that Lawton was the supervisor. (A.24) The Administrative Law Judge does not discredit Brandao's testimony on the basis of her demeanor. Instead, he merely comments that Brandao "was a friend of Lawton's and whose job as a supervisor, not protected by the Act, could have been placed in jeopardy by her testimony." (A.33-34) (emphasis supplied) At no point does the Administrative Law Judge state any conclusion concerning Brandao's credibility - it is only by an implied suggestion that he disregards her testimony on the wholly speculative basis that her job could have been placed in jeopardy.

Fifth, the Board's General Counsel failed to produce a single employee witness who corroborated the testimony of Cornell and Hirschfeld concerning the allegation that the employees had widely discussed their "grievances" over the new petty rules. (A.33) The Administrative Law Judge reports this fact without comment. The testimony which Cornell and Hirschfeld gave, if true, could readily have been corroborated. Both Cornell and Hirschfeld

knew the names of the employees with whom they allegedly had had these discussions - yet not one person verified the testimony of the alleged discriminatees.

Sixth, the Administrative Law Judge stated that "Lawton's main support" for her denial of work rule changes came from Brandao. (A.33) This obviously is not true, as demonstrated by the testimony of employees Betsy Reed, Marian Lloyd and Barbara Joyce, and the absence of any corroboration of Cornell and Hirschfeld by other employees.

Seventh, despite the background of denials from other employees and the complete lack of corroboration from other employees, the Administrative Law Judge purports to credit Cornell and Hirschfeld on the basis that Lawton failed to deny that she had "a conversation at approximately noon on January 21 with Cornell and Hirschfeld" in which Lawton made the work rule changes. (A.24) Lawton's testimony on this point is as follows:

> Q. (By Columbia's Counsel) Did you have any discussions with Dru or Muriel on January 21st?
>
> A. Yes, I did.

Q. When did you have those discussions, and with whom?

A. I saw Muriel Hirschfeld on the 21st day of January.

Q. At what time?

A. It was in the afternoon. I would say about 10 to 5:00 or a quarter to 5:00.

Q. How did that meeting come about?

A. She said that she wanted to see me. I went into my office and I took her inside. She discussed with me that she was not satisfied with the way I was treating her, and she didn't want to be told when to go to the ladies' room, or when to do this, or when to do that.

Q. Was that rule in effect when you were an operator?

A. Yes, it was.

Q. Did you ever change that rule?

A. Never. (A.214-215)

It is respectfully submitted that a fair and unbiased reading of this testimony shows that Lawton did deny the essential allegation made by Cornell and Hirschfeld concerning the alleged meeting between them. The Administrative Law Judge improperly disregards the plain meaning of this testimony with his comment

that Lawton failed to deny a conversation "at noon". The Administrative Law Judge's hyper-technical approach in evaluating Lawton's testimony should be compared with the free and easy manner in which he disregards acknowledged errors in Cornell's testimony (A.34; A.36) and ignores the contradictions and denials of Cornell's and Hirschfeld's testimony by other employee witnesses.

The Administrative Law Judge states that the truth concerning the change of work rules and the alleged discussions among employees ensuing therefrom is relevant only to the resolution of credibility between Lawton, Cornell and Hirschfeld. (A.33) This is incorrect because the Administrative Law Judge uses his finding that the employees held such discussions as a basis for several other findings - such as the important findings that Cornell and Hirschfeld were engaged in protected concerted activities, that the activities of Cornell and Hirschfeld were well known to other employees, and that knowledge of such activities may be imputed to Columbia because of the relatively small complement

of telephone room employees. (A.42) Though the Administrative Law Judge may say that his finding in this respect is material only to the question of credibility, it is clear that he would necessarily have reached an entirely different conclusion had he correctly determined that the weight of the evidence did not establish that Cornell and Hirschfeld were acting to remedy the grievances of all of the other employees in the office. Theoretically, Hirschfeld and Cornell could have acted in unison without the knowledge of any other employee, but there would then be no basis for the inference drawn by the Administrative Law Judge that Lawton learned of their activities through other employees in the "small complement" of employees in the telephone room. (A.42)

POINT III

THE ADMINISTRATIVE LAW JUDGE ERRED IN FINDING THAT CORNELL AND HIRSCHFELD DISCUSSED WITH OTHER EMPLOYEES THE FORMATION OF A GRIEVANCE COMMITTEE

A major portion of the cas against Columbia consists of the Administrative Law Judge's finding that on January 21 and 22, Cornell and Hirschfeld began an effort to organize a grievance committee for and with the knowledge and approval of the employees of the telephone room. This allegation is important because Cornell and Hirschfeld claimed to be the leaders in this activity - and this alleged position of leadership allegedly motivated Lawton to discharge them.

It is also important because the Administrative Law Judge cited the timing of the discharges in relationship to these alleged concerted activities as further evidence of the unlawful motivation behind the discharges. (A.32) Finally, the Administrative Law Judge relied upon the alleged widespread knowledge of these activities among the employees as a basis for his further finding that Lawton also became aware of Cornell's and Hirschfeld's activities through the other employees (A.42)

First, Hirschfeld's testimony concerning the alleged discussion of a grievance committee is in direct conflict with her pre-trial affidavit to the Board. Hirschfeld's pre-trial affidavit states as follows:

> "On Monday, January 21, 1974, I was in the switchboard area with the other operators and we discussed the various rules and regulations that we felt were unfair in our department. Present were Drusilla Cornell, Marion Lloyd, Gwen Rodgers, Roxanna Brandeau (sic), Barbara Joyce and myself. This was about 1:00 P.M. when we had this conversation.
>
> The other girls were getting ready to leave at about 10 minutes to five when I told Dru Cornell that I felt I should go in to speak to Mrs. Lawton, our supervisor, about the rules we felt were unjust. Dru agreed with me and said that she would back me up. The other girls were not aware of what I was going to do..." (A.69, emphasis supplied)

Thus, Hirschfeld's pre-trial affidavit makes no mention of a discussion among the operators of a grievance committee on January 21 and then goes on to state that the other operators were not aware of what Hirschfeld intended to do. Without reference whatsoever to this irreconcilable conflict between

the pre-trial affidavit and the testimony of Hirschfeld and Cornell, the Administrative Law Judge states that "if only Hirschfeld had testified to this matter, I would have great difficulty in deciding whether her testimony was more credible in this respect then the testimony of Lawton." (A.33) The Administrative Law Judge then credits Cornell, whose testimony has the same inconsistency with the pre-trial affidavit of her alleged companion discriminatee and, again reversing his field, then "credits" Hirschfeld because Hirschfeld's testimony "parallels" that of Cornell! (A.34)

It is respectfully submitted that (a) Cornell and Hirschfeld had the same interests in the trial, (b) gave the same story, (c) Hirschfeld's pre-trial affidavit contradicts the testimony of both Hirschfeld and Cornell, (d) the Administrative Law Judge totally ignored this irreconcilable inconsistency and (e) his decision is therefore unsupported by substantial evidence considering the record as a whole.

Second, Cornell's testimony was uncertain with respect to the alleged grievance committee. On her direct examination she did not even mention a grievance committee until reminded

of it by the Board's trial counsel. (A.82) Although the Administrative Law Judge makes the unwarranted assertion that Lawton's testimony was adduced through leading questions, he ignores this significant lapse of memory by Cornell. This is another example of the Administrative Law Judge's double standard in evaluating testimony.

Third, the employees to whom Cornell and Hirschfeld allegedly spoke in this regard either denied or failed to corroborate such conversations as pointed out supra with respect to employees Betsy Reed, Marian Lloyd and Barbara Joyce at pages 7-8 of this Brief.

In addition to the alleged conversations with day shift employees Reed, Lloyd and Joyce reported supra, Cornell testified that she and Hirschfeld spoke with evening shift employees George Ford and Morris Dunlop about the formation of a grievance committee on the evening of January 21 and 22. Neither Ford nor Dunlop reported for work on January 21, as the Administrative Law Judge notes. (A.30) The only comment made by the Administrative Law Judge with respect to this clear error in the

testimony of both Cornell and Hirschfeld is that "Cornell's recollection of who was working with her and Hirschfeld might have been faulty..." (A.36)

The Administrative Law Judge ignores the significant fact that the testimony of both Cornell and Hirschfeld was in error on the same point, which not lightly suggests a jointly rehearsed and agreed upon version of the facts. The Administrative Law Judge even suggests an excuse for this joint error which was not given by either Cornell or Hirschfeld nor warranted by the record, namely, that "there had to be other operators working inasmuch as the consoles had to be manned." (A.36)
Both Cornell and Hirschfeld testified without equivocation that they had spoken to Ford and Dunlop on January 21 - neither Cornell nor Hirschfeld ever suggested that the alleged conversation may have been held with other employees.

The Administrative Law Judge handles this conflict by discounting Ford's and Dunlop's testimony because each was employed by Columbia and presumably it was in their self-interest to give testimony which would not hurt their employer. (A.35)
This, without more, is not a proper basis for discrediting

testimony of an employee witness. Que Enterprises, 140 N.L.R.B. 1001. At no point does the Administrative Law Judge show any recognition of a similar, if not stronger, self-interest on the part of Hirschfeld and Cornell. Clearly, the Administrative Law Judge used inconsistent standards to evaluate the testimony of the various witnesses.

With respect to Ford, the Administrative Law Judge further found his testimony "unreliable" because of "his inability to recall any substantial amount of the events on the night of January 22." (A.35) This is circular reasoning which makes sense only if it is assumed that Cornell and Hirschfeld did in fact discuss the formation of a grievance committee with Ford. Contrary to the Administrative Law Judge, Ford testified to what transpired between him and Cornell and Hirschfeld on the evening of January 22 - and obviously not much did occur. Ford specifically denied that he had any conversations with Cornell or Hirschfeld on January 22 relating to a grievance committee or any other matter concerning employee rights. (A.248, 249, 251-252)

Ford's testimony, whether correct or incorrect, contradicts the testimony of Cornell and Hirschfeld. It was this contradiction that the Administrative Law Judge purported to

resolve by finding Ford's testimony "unreliable". (A.35) Despite this, the Administrative Law Judge gives as a reason for crediting Cornell and Hirschfeld the amazing assertion that their testimony with respect to January 22 "somewhat parallels the testimony of Ford." (A.34)

The Administrative Law Judge also discredits Morris Dunlop on the basis that he was employed by Columbia and, in addition, misreports his testimony in stating that Dunlop's testimony "somewhat parallels" the testimony of Cornell. (A.34)

Dunlop testified that on several occasions prior to January 22 he warned Cornell and Hirschfeld to be careful in their attempts to unionize the employees. Dunlop's testimony in this regard was consistent with the testimony of other employee witnesses who recalled that there were discussions among the employees about unionization at least as early as December, 1973. (A.29) Dunlop and the other employee witnesses made a definite distinction between discussions of unionization, which apparently had been going on for some time, and discussions of a grievance committee, as alleged by Cornell and Hirschfeld. (A.253) This distinction is important because the entire thrust of the case

against Columbia is that Lawton discharged Hirschfeld and Cornell when Lawton allegedly became aware of their purported activities to form a grievance committee two days prior to discharge. The testimony of activity among the employees to join a union over a month earlier is inconsistent with the case against Columbia because there is no evidence whatsoever in the record that Lawton or any other Columbia supervisory personnel took any steps to defeat this attempt at unionization or made any anti-union statements.

Furthermore, Dunlop expressly testified that his warning to Cornell and Hirschfeld to be "careful" was not based upon any experience in his employment with Columbia but was based upon his experience with other employers.

> MR. ROSENBERG: I have no further questions.
>
> ADMINISTRATIVE LAW JUDGE FRIEDMAN: I have one question.
>
> You say that when they came in, that is Drucilla and the other lady, when they started to organize, or talk about organization, you told them to take it easy, be careful because they might be fired.
>
> What made you think that?
>
> THE WITNESS: I have seen it happen a lot of places.
>
> ADMINISTRATIVE LAW JUDGE FRIEDMAN: At Columbia?

THE WITNESS: No, not Columbia.

ADMINISTRATIVE LAW JUDGE FRIEDMAN: Not in this shop at Columbia?

THE WITNESS: No. (A.256-257)

The Administrative Law Judge asks the rhetorical question, "if they (Dunlop, Cornell and Hirschfeld) were not discussing a grievance committee on that night (January 22), why should Dunlop have warned Cornell and Hirschfeld that they were possibly subject to removal as probationary employees." The answer is that Dunlop never testified that he had such a discussion with Cornell on January 22 - he merely testified that he so warned Cornell and Hirschfeld on several occasions and that one such occasion might have been January 22. (A.254) Dunlop expressly denied that the warning involved a grievance committee but involved an attempt at unionization. The Administrative Law Judge's use of an unanswered rhetorical question is a device which, in its effect, ignores the record and fails to deal with testimony that is plainly contrary to the answer implied by the Administrative Law Judge.

For the reasons set forth above, Columbia respectfully requests the Court to reject the finding that Cornell and Hirschfeld discussed the formation of a grievance committee with other employees, as well as the findings which flow therefrom, particularly the findings (a) that Cornell had a position of leadership among the

employees which prompted Lawton to discharge her, (b) that the timing of the discharge immediately followed a period of widespread concerted activity among all the employees and (c) that other employees reported Cornell's alleged activities to Lawton.

POINT IV

THE ADMINISTRATIVE LAW JUDGE ERRED IN FINDING THAT LAWTON DISCHARGED CORNELL ON JANUARY 23 BECAUSE OF CORNELL'S ALLEGED ACTIVITIES ON JANUARY 21 and 22

The Administrative Law Judge found that "the activities of both Hirschfeld and Cornell reported to (Lawton) on January 21 or 22 [2/] were sufficient to cause (Lawton) to fear that Cornell was a possible impediment to her security in her new position. Therefore, when, on Wednesday, January 23, Cornell presented herself as a witness for Hirschfeld and injected herself into a matter which Lawton considered was more of Cornell's business, Lawton, having in mind what had passed in the 48-hour period before that moment, then and there decided to discharge Cornell." (A.43)(emphasis supplied)

It is submitted that even if it be assumed that Lawton knew of Cornell's alleged broad concerted activities at the time Cornell "injected herself" into the meeting between Hirschfeld and Lawton, there is no evidentiary basis for the finding that Lawton was

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2/ In Points II and III of this Brief, we show that the record as a whole does not support the allegation that Cornell engaged in broad concerted activities among the entire employee staff. At best, Cornell's alleged concerted activities on January 21 and 22, if any, were restricted to such activities as she may have undertaken in concert with Hirschfeld. Lawton and the other employees were unaware of Cornell's or Hirschfeld's alleged concerted activities. In this section of the Brief it is assumed, arguendo, that Lawton knew of Cornell's alleged broad concerted activities.

contemplating this activity when she discharged[3/] Cornell on January 23. The Administrative Law Judge's finding as to what was in Lawton's mind when she "discharged" Cornell is speculation which is contrary to the weight of the evidence in the record as a whole.

The Administrative Law Judge acknowledges that Lawton may have had a lawful basis for the discharge (violation of University policy) but that the discharge was motivated "in major part" by Lawton's "animus" against Cornell because of Cornell's alleged concerted activities. (A.43) In essence, the Administrative Law Judge holds that Lawton seized upon Cornell's behavior on January 23 as a pretext for discharging her. Columbia submits that the record as a whole does not warrant the inference of a pretext.

First, it is significant that the discharge was precipitated by Cornell's actions. Lawton did not anticipate or plan the discharge in advance of the time that Cornell "injected herself" into the meeting between Hirschfeld and Lawton. Thus, this case should be distinguished from the more usual pretextual cases where the employer discharges an employee after the opportunity for careful thought. Regardless of whose version of the discharge is credited, it is

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3/ Lawton testified that the "discharge" consisted of Cornell's statement that if Hirschfeld was discharged Cornell "was going to leave also" and Lawton's response that "if that is the way you feel about it, you are free to do that." (A.220) In this section of the Brief, it is assumed, arguendo, that Lawton initiated the discharge after Cornell repeatedly refused to leave Lawton's office, as found by the Administrative Law Judge. (A.39)

obvious that Lawton acted on impulse prompted by Cornell's aggressive intrusion into the interview. Columbia submits that in the instant case the standard of proof to warrant an inference of an unlawful pretext should be substantially higher than the standard used in a case in which the employer has had the time to carefully evaluate all factors and cold bloodedly reach a conclusion.

In the instant case both Hirschfeld and Cornell testified that Lawton was shouting and made physical threats to each when each refused to leave Lawton's office. Lawton denied this but alleged that Hirschfeld was "a little loud." (A.220) The Administrative Law Judge found that "both parties undoubtedly raised their voices." (A.39) In any event, emotions ran high in a short time span. Under these circumstances, the inference of a pretext should be accepted only if there is clear evidence warranting such inference because the most natural inference is that the discharge was prompted by the high emotional factors.

Second, there is no evidence of any prior statement by Lawton of animus against Cornell because of her alleged concerted or union activities. Indeed, on the day before the incident giving rise to the discharge Cornell told Lawton that Cornell had posted the notice concerning employee rights. Lawton accepted this information calmly and made no direct or indirect threat against Cornell on that occasion. (A.91-93, 218-219) Thus, Lawton's course of conduct prior to January 23 does not support the inference of a pretext but,

on the contrary, tends to negate such inference.

Third, it is significant that both Lawton and Cornell knew that Columbia had established a formal grievance procedure for those Columbia employees who are not employed in a collective bargaining unit represented by a labor organization. In addition, Columbia has several union contracts with several different unions covering thousands of Columbia's employees. Under these circumstances, the fact that Cornell may have been considering the formation of a grievance committee would not and did not alarm Lawton or other Columbia supervisors. Cornell's alleged statements of employee's rights should not give rise to an inference that she was discharged for making such st tements (a) when the facts establish an independent lawful reason for the discharge and (b) there is no evidence of animus toward Cornell because of such statements by either Columbia as an employer or Lawton as an individual supervisor.

The Administrative Law Judge failed to properly evaluate these factors because of his assumption that union or concerted activities among employees are invariably disturbing to employers. As an example of the Administrative Law Judge's prejudice in this respect, he finds it "incredible" that McGrady (Lawton's supervisor) would not have been "concerned" about the notice regarding employee

rights to present grievances.[4/] Whatever the Administrative Law Judge's experience may have been in labor relations in the general industrial sector, there is no evidence in this case that any supervisor of Columbia, an educational institution with several union contracts and a grievance procedure for its unrepresented employees, found Cornell's alleged concerted activities a matter of "concern". The burden is not upon Columbia to prove that its supervisors have not acted in the manner of the prototype supervisors conceived in the mind of the Administrative Law Judge. The burden is upon the Board to show that the record in this case justifies the inference as to the workings of Lawton's mind when she discharged Cornell. The factors cited above, particularly Lawton's calm discussion with Cornell on January 22 with respect to the posting of the notice, negates the validity of the inference drawn by Administrative Law Judge.

The only basis set forth for the Administrative Law Judge's speculation concerning the operations of Lawton's mind is his inference that Lawton was "somewhat insecure" in her new position, which inference is, in turn, based upon "talk among the employees that Lawton was suspicious of most of the employees, if not all."

4/ McGrady testified Lawton informed him of the notice in an "amused" tone of voice. McGrady told Lawton to "file it away" and send him a copy of the notice. "We file everything at Columbia University. We never throw anything away." (A.209-210) McGrady did not ask Lawton to do anything further with respect to the notice and nothing further was done.

(emphasis supplied) This is the so called "plot" against Lawton which the Administrative Law Judge says caused her to feel "somewhat insecure". (A.43)

The only testimony with respect to Lawton's alleged knowledge of a "plot" against her came from Cornell. (A.13) (A.19-20) Cornell's testimony was denied by Lawton. (A.218-219) At one point Cornell testified that Cornell was told by an employee named Wells that Lawton had told Wells and other employees that Lawton was aware of a "plot" against her. Wells was not called as a witness. Although the Administrative Law Judge acknowledges this to be hearsay, he accepts the testimony "because its content conforms to other events hereinafter related." (A.13) But the only other testimony cited by the Administrative Law Judge which "conforms to" Cornell's testimony on this matter is Cornell's other testimony that Lawton told Cornell that Lawton was aware of "plots" against her. Columbia respectfully submits that Cornell's testimony with respect to "plots", if true, could readily be corroborated by Wells and in the absence of such corroboration should not be accepted. The Administrative Law Judge's acceptance of this testimony is another example of his uneven evaluation of testimony throughout the case, particularly

in the light of failure of corroboration of Cornell's testimony on other significant points, as shown supra.

In conclusion:

a. Lawton had a lawful reason for the discharge.

b. The finding that Lawton used the lawful reason as a pretext is based upon an inference as to the operation of Lawton's mind at the time of discharge.

c. The inference as to the operation of Lawton's mind is based upon at least two other prior inferences - that Lawton knew of Cornell's alleged broad concerted activities and that she was insecure because of such activity by Cornell.

d. Such inference is not warranted: There was no preparation by Lawton for discharge; there was no expressed animus against Cornell; Lawton had previously dealt with Cornell calmly with respect to the posting of the notice; Cornell's allegations of other concerted activities among employees is not supported by the record as a whole; Columbia has an established procedure for presentation of employee grievances; the only basis for the finding of Lawton's "insecurity" is hearsay and the uncorroborated testimony of Cornell herself.

POINT V

THE ADMINISTRATIVE LAW JUDGE ERRED IN INFERRING THAT LAWTON KNEW OF CORNELL'S ALLEGED CONCERTED ACTIVITIES UNDER THE THEORY OF WEISE PLOW WELDING

Lawton acknowledged that on January 22, Cornell told her that Cornell had posted the notice concerning employee rights. Though this in itself may be deemed to be knowledge of incipient concerted activity in a technical sense, the Administrative Law Judge's findings go beyond this to knowledge by Lawton of other alleged concerted activities under the theory of Weise Plow Welding Co.[5/] (A.42; A-43)

This inference that Lawton knew more than the fact that Cornell had posted the notice is important because the Administrative Law Judge relies upon the inference of broader knowledge as support for his findings as to Lawton's "insecurity", and from "insecurity" he infers unlawful motivation in the discharge.

5/ 123 NLRB 616, (1959)

The Administrative Law Judge construes Weise Plow to justify the inference that employees other than Cornell and Hirschfeld "reported" their alleged concerted activities to Lawton "on January 21 or 22."[6/] (A.43) This inference is warranted, says the Administrative Law Judge, because of the "small complement" of employees in Columbia's telephone room. (A.42) Columbia submits that the holding in Weise Plow is not authority for this inference in the instant case.

There are several important distinctions between Weise Plow and the instant case, as follows:

A. In Weise Plow the employer engaged in a series of overt threats against employees if the plant employees were organized by a union, including the serious threat of reducing operations to four months per year. In the instant case, no supervisor at Columbia is alleged to have made any unlawful threats.

B. In Weise Plow the employer made continuous efforts to learn the identity of the union adherents and engaged in unlawful interrogation of employees in so doing. This is very important because this course of conduct might well justify the

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6/ The vagueness of the inference as to date illustrates its tenuous nature.

inference that at some point the employer succeeded in his efforts. In the instant case no Columbia supervisor is alleged to have made any effort to gather information concerning union or concerted activity, through interrogation of employees or otherwise.

C. In Weise Plow there was no doubt that the discharged employee had spoken to fellow employees on at least six or seven occasions about the union. In the instant case, it appears that such concerted activities in which Cornell and Hirschfeld may have been engaged were confined to private conversations between the two of them. Although they alleged various discussions with other employees their testimony in this regard is either denied or uncorroborated by other employees. The evidentiary rule set forth in Weise Plow is inapplicable where several employees in a "small complement" of employees have actually testified contrary to the testimony of alleged discriminatees and no employees have corroborated testimony which should have been corroborated if true. Clearly the inference that other employees reported to Lawton should not be drawn unless the employees themselves are shown by clear and independent evidence to have knowledge of the events they allegedly reported. In the instant case, that basic knowledge

on the part of the employees has not been established with the degree of certainty which would warrant a further inference based upon such disputed allegations.

D. In Weise Plow the employer was found guilty of several independent violations of the Act. The inference drawn by the Board as to the employer's knowledge of his employee's union activities was grounded upon, inter alia, a general propensity to thwart the rights of employees as well as specific violations of the Act which were proven apart from consideration of the questions involving the alleged discriminatee. In the instant case, there are no alleged violations of the Act other than the discharge itself, highly unusual in any unfair labor practice proceeding.

E. In Weise Plow the employer was found guilty of unlawfully discharging an employee other than the discriminatee whose case was based upon the inference of employer knowledge under the "small complement" theory. Thus, there was entirely independent proof of the employer's readiness to do the very act which was inferred with respect to the second discriminatee. In the instant case, the Board dismissed the charge that Hirschfeld had been unlawfully discharged, a charge based in large

measure upon the same allegations which are argued by the Board to support the finding that Cornell was unlawfully discharged.

F. In Weise Plow the discriminatee was discharged without warning or stated reason, in a discharge initiated by the employer. In the instant case, Cornell's belligerent behavior forced the issue of discharge and she was discharged only after repeated warnings by Lawton to leave Lawton's office and return to work.

In summary, all of the above factors, and others, were expressly cited by the Board in Weise Plow as its basis for drawing the inference which it did concerning employer knowledge of the discriminatee's union activities. Neither logic nor experience justify the assertion that an employer will become aware of the union or concerted activities of its employees merely because it has a "small complement of employees." Contrary to the Administrative Law Judge, the Board did not so hold in Weise Plow. An equally strong argument may be made that a small complement of employees is more likely to keep secrets than a larger group.

Based upon the foregoing, the finding that Lawton knew of the alleged broad concerted activities of Cornell and

Hirschfeld is not supported by substantial evidence based upon the record as a whole. The Court is respectfully requested to reject said finding and the other findings which flow from it, principally the finding that Lawton "had sufficient reason to feel unhappy, alarmed and somewhat insecure about the activities of Cornell which had been reported to her" and that by reason of this insecurity Lawton discharged Cornell.

POINT VI

THE ADMINISTRATIVE LAW JUDGE ERRED IN THE INFERENCES HE DREW FROM THE TESTIMONY OF EMPLOYEE BETSY REED

Betsy Reed was a clerk-typist for Columbia. She testified that on January 22, Lawton told her that Hirschfeld was to be discharged the next day, January 23. Reed testified that on that occasion Lawton further stated that "if Dru (Cornell) didn't watch her step, she would be next."

The Administrative Law Judge found that Hirschfeld had been discharged for engaging in protected concerted activities. He then inferred that the statement that "Cornell would be next" meant that Cornell "would be next" for the same motivation he incorrectly ascribed to Hirschfeld's discharge. The Administrative Law Judge placed great weight upon Reed's testimony in reaching his conclusions with respect to both Hirschfeld and Cornell. In discussing Hirschfeld's discharge, he cites the fact that Lawton mentioned Cornell in discussing Hirschfeld's discharge as evidence of the unlawful nature of Hirschfeld's discharge. (A.41) Then, in discussing Cornell's discharge, he cites the same testimony as evidence of the unlawful nature of Cornell's discharge. (A.43)

But the Board rejected the Administrative Law Judge's finding that

Hirschfeld had been discharged for engaging in protected concerted activities. The Board did not find this evidence persuasive with respect to Hirschfeld and it is no more persuasive with respect to Cornell. The inference drawn by the Administrative Law Judge from this statement concerning Cornell should also be rejected.

Lawton's statement to Reed is, on its face, not probative of any unlawful motivation. Nor is there anything in the context in which it was said which establishes an unlawful motivation. Lawton merely said, in announcing the discharge of one employee for cause, that another employee might also be discharged. The most reasonable inference to be drawn from this is that the second employee might also be discharged for cause.

There is no evidence in the record which establishes that Lawton knew of Cornell's alleged concerted activities at the time Lawton made this statement. The Administrative Law Judge does not say that there is any such evidence. Instead, he says, without any explanation whatsoever, that Lawton "probably" made the statement to Reed after Cornell had told Lawton that Cornell had posted the notice with regard to employee grievances. (A.27) Thus, the conclusion that this statement is evidence of Lawton's unlawful motivation is an inference based upon an inference which is wholly

speculative and acknowledged by the Administrative Law Judge to be so.

As an alternative basis for his conclusion that Lawton's statement is evidence of an unlawful motivation, the Administrative Law Judge imputes to Lawton knowledge of Cornell's alleged concerted activities under the theory of the Wiese Plow case.[7] Using this rationale, the Administrative Law Judge holds (a) that Cornell was engaged in concerted activity on January 21, (b) which concerted activity was known to all or most of the other employees in the telephone room, (c) that one or more of these employees informed Lawton of Cornell's concerted activity before Lawton made her statement to Reed and, (d) that the statement therefore refers to Cornell's concerted activity. It is respectfully submitted that this conclusion is not warranted because it is based upon a series of doubtful inferences which are contrary to the weight of the evidence.[8]

7/ See Point V of this Brief for discussion in greater depth.

8/ See Points II, III, IV and V of this Brief.

POINT VII

THE DOCTRINE OF THE WEINGARTEN CASE IS INAPPLICABLE BECAUSE THERE IS NO STATUTORY REPRESENTATIVE IN THIS CASE

The Board cites NLRB v. Weingarten, Inc., 420 U.S. 251 (1975) as a basis for the finding that the discharge of Cornell violated Section 8(a)(1) of the Act.

In both NLRB v. Weingarten, Inc., and its companion case, ILGWU v. Quality Mfg. Co., 420 U.S. 276 (1975) the United States Supreme Court upheld the Board's view that Section 7 of the Act guarantees an employee the right to union representation at an interview with his employer which may put his employment in jeopardy. In the context of both cases, it is clear that the "union" is not any union but only the "statutory representative".[9/]

Despite the alleged agreement between Cornell and Hirschfeld to act as witnesses for one another, it is undisputed that Hirschfeld did not request Lawton to permit Cornell to witness the interview of January 23 between Hirschfeld and Lawton. Accordingly, whatever Section 7 right is asserted in the instant case must flow from Cornell and not from Hirschfeld.

The Weingarten case does not hold that a union has the

9/ In his dissent in Weingarten, 420 U.S. at 270, Justice Powell says that "while the Court speaks only of the right to insist upon the presence of a union representative, it must be assumed that the Section 7 right today recognized...also exists in the absence of recognized union." But this comment appears to be stated as a part of the rationale of the dissent rather than an interpretation of the Court's opinion. Justice Powell is demonstrating his dissatisfaction with the Court's opinion by extending it to include concerted but non-union activity. However, the Court's opinion does not reach this far.

right to interrupt an employer's meeting with its emplovee in the absence of a request by the employee for union representation. However, assuming arguendo that a union may have such a right to protect the interests of the other employees in the collective bargaining unit, in the instant case Cornell, as an individual employee, is not and may not be accorded the status of a certified collective bargaining representative.

While Cornell undoubtedly has rights under Section 7 of the Act, nothing in the Act grants to Cornell or any other individual employee the right to intervene in a meeting initiated by management with another employee. Such an interpretation of the Act would encourage industrial chaos. The Act certainly prohibits employers from taking adverse action against employees who engage in concerted activities for their mutual aid or protection, but the Act does not require employers to meet or bargain with any group of employees unless that group is a labor organization which represents the majority of the employees in an appropriate bargaining unit. Under the circumstances of this case it was not protected concerted activity for Cornell to "inject herself" in Lawton's meeting with Hirschfeld.

The Administrative Law Judge errs in his tacit assumption that Cornell's intervention after the discharge may be justified upon the theory that Cornell had a right to intervene. This tacit

assumption is found in the Administrative Law Judge's statement that Cornell's "intervention" came "at the first opportunity that Cornell had to learn that her coactivist was in trouble." (A.45)

Whether this was the first opportunity or not, the Act does not grant to any employee the right to interrupt an employer's meeting with another employee. Even so, Cornell was not discharged for the initial interruption but for her refusal to leave Lawton's office and to return to her unattended console upon Lawton's request to do so. (A-97; 220)

Columbia has never disputed the fact that employees have the right under Section 7 to present grievances to their employer through concerted activities and, in fact, Columbia has a formalized grievance procedure for employees which expressly permits a grievant to have another employee act as a witness in the presentation of the grievance to management personnel. (A.63) However, contrary to the Administrative Law Judge's opinion (A.44)

Cornell's intervention at the discharge interview was neither intended nor perceived by any of the witnesses as the presentation of a grievance under the Act or under Columbia's policy.

In this respect, it is significant that Columbia permitted Hirschfeld and Cornell to jointly present their grievances to higher management personnel, Messrs. McGrady and McKeever, without objection. Cornell at all times had an acknowledged right to witness the

presentation of Hirschfeld's grievance but this is not the subject of Lawton's meeting with Hirschfeld on January 23.

For the foregoing reasons, the Court should refuse enforcement of the Board's Order to the extent that it is based upon the doctrine of the Weingarten case.

POINT VIII

THE DOCTRINE OF THE WEINGARTEN CASE IS INAPPLICABLE BECAUSE HIRSCHFELD DID NOT REQUEST THAT CORNELL ACT AS HER WITNESS

It is undisputed that Hirschfeld never requested that Lawton permit Cornell to act as Hirschfeld's witness in the final interview. Hirschfeld admitted that Lawton had discharged her and had asked her to leave the office before Cornell entered. (A.187), 188 Even after Cornell appeared, Hirschfeld said nothing to Lawton indicating that Hirschfeld wanted Cornell to remain. (A.39, 43-44)

The Administrative Law Judge states that Hirschfeld did not have an opportunity to make such a request and on this basis implies that such a request was unnecessary in this case. (A.44)

In Weingarten, supra, the Supreme Court expressly held that the right asserted by the Board in this case:

> "arises only in situations in which the employee requests representation. In other words, the employee may forego his guaranteed right and, if he prefers, participate in an interview unaccompanied by his union representative." 420 U.S. at 257.

Indeed, the entire procedure envisioned by the Supreme

Court assumes that the employee who desires union representation has made a request to the employer for such representation. Thus, after the employee has made such a request, the employer is accorded the choice either of allowing union representation or of discontinuing the interview. Unless the employee who is being interviewed makes the request for union representation, the employer is under no obligation to permit representation by a union or any other party.

Also, it is undisputed that Lawton's purpose in meeting with Hirschfeld was merely to inform Hirschfeld of her discharge. Hirschfeld was not called upon to defend herself or to answer any questions. Indeed, Hirschfeld's immediate request to appeal her discharge to McGrady shows that Hirschfeld understood that the discussion with Lawton had ended. Accordingly, the rationale set forth by the Supreme Court in Weingarten for the right of union representation is not applicable in this case.

For the foregoing reasons the Court should not enforce the Board's Order to the extent that it is based upon the doctrine of the Weingarten case.

POINT IX

THE COURT SHOULD NOT ENFORCE THE BOARD'S ORDER TO THE EXTENT IT IS BASED UPON THE DOCTRINE OF THE WEINGARTEN CASE BECAUSE THE BOARD HAS FAILED TO ADEQUATELY EXPLAIN WHY SUCH DOCTRINE IS APPLICABLE IN THIS CASE

The Board's holdings with respect to the asserted Section 7 right outlined in the Board's Brief to this Court, pages 18 and 19, are a "tortured history". (Weingarten, supra, Chief Justice Burger's dissent, at page 269) The Board from time to time adopted different and inconsistent views, culminating in the Weingarten case in which the Supreme Court reviewed the history of this litigation over a period of years and then held that Section 7 of the Act "creates a statutory right in an employee to refuse to submit without union representation to an interview which he reasonably fears may result in his discipline." 420 U.S. at 256

The obvious distinctions between the Weingarten case and the instant case are set forth in Points VII and VIII of this Brief. Yet, despite these obvious distinctions, the Board cites Weingarten as controlling without explanation. The Board's entire decision on this matter is as follows:

"We find, in agreement with Administrative Law Judge, and for the reasons stated in his Decision, that Respondent violated Section 8(a)(1) of the Act when it suspended and then discharged employee Drucilla Cornell. N.L.R.B. v. Weingarten, Inc., 420 U.S. 251 (1975)"

The Administrative Law Judge was not in a position to analyse the instant case in terms of the Supreme Court's decision in Weingarten because his decision was issued prior to the Supreme Court's decision. However, the Board itself was deficient in failing to explain its rationale.

The considerations involved in the Weingarten case are complex and, as the history of the litigation shows,[11/] on several occasions the Board reversed itself, on several occasions various Courts of Appeals denied enforcement of Board Orders and the Supreme Court itself was divided on the case, with three dissenting Justices writing two separate dissents. The Board has an obligation to set forth its rationale for all major policy decisions. In the instant case the Board's interpretation of Weingarten clearly is an

11/ See footnote 3, Weingarten, supra, at 253

extension of the Court's opinion in that case. Columbia respectfully submits that this Court should deny enforcement of the Board's Order for failure to adequately set forth its rationale, whether or not the Court's independent view of the issues raised in Points VII and VIII of this Brief are consistent with the Board's Decision. N.L.R.B. v. Metropolitan Insurance Co., 380 U.S. 438, 443 (1965)

POINT X

THE ADMINISTRATIVE LAW JUDGE ERRED IN HIS FINDING THAT McGRADY'S LETTER OF SUSPENSION TO CORNELL WAS A CONSTRUCTIVE DISCHARGE FOR UNLAWFUL REASONS

During the final interview with Lawton on January 23, both Hirschfeld and Cornell asked for the right to present a grievance to McGrady, Lawton's supervisor, with respect to Lawton's action in discharging them. Mr. McGrady went to the telephone room and spoke to Hirschfeld and Cornell, together, shortly after Lawton discharged them. After listening to them, he ratified Lawton's decision in discharging Hirschfeld because she was a probationary employee, but he immediately changed Cornell's discharge into an indefinite suspension in order to give him time to investigate further. McGrady told both Hirschfeld and Cornell that "they had a perfect right to go over and talk to personnel and take it up from there." Cornell and Hirschfeld indicated that they would do so. (A.199-204) Hirschfeld, Cornell and Cornell's fiance went together to Columbia's Personnel Office and on the next day, January 24, presented their grievances to James McKeever, Columbia's Personnel Director. (A.101-102, A. 170)

Cornell testified as follows concerning the meeting with

McKeever on January 24:

> Q. (By Board's trial counsel) Did you meet with Mr. McKeever the next day?
>
> A. Yes, we did.
>
> Q. Did you meet with him alone?
>
> A. No, we did not. Once again we had a discussion about the right to have a witness.
>
> Mr. McKeever told us that the University grievance procedure had been rewritten since that book.
>
> We asked to see a Xerox copy of that procedure. That procedure also said that we had a right to have a witness in all three steps.
>
> Mr. McKeever granted us the right to act as each other's witness or to have one witness each from outside; we chose to have one with each from outside.
>
> Q. Who were the witnesses?
>
> A. Muriel's witness was a woman by the name of Debbie Bell and my witness was a woman by the name of Margie. I don't know her last name. (Tr. 42, 43 emphasis supplied)

On January 25, the day after the meeting with McKeever, Cornell telephoned McGrady. McGrady told her that the decision with respect to her was to suspend her for three days, January 23, 24 and 25, and that she would be expected to return to work the next Monday, January 28, 1974. In this telephone conversation

McGrady read to Cornell the following letter:

> This letter will confirm the verbal suspension given to you on January 23, 1974. This suspension was necessitated because of your uncalled for interference with the normal conduct of business by the chief operator and your refusal to desist with this interference when ordered to do so by the chief operator, your supervisor.
>
> You are suspended from your position as telephone operator at Columbia University as of January 23, 1974. This suspension is for a period of 3 working days. You will be expected back at your work January 28, 1974.
>
> You are, furthermore, warned that any repetition of the aforementioned conduct will result in the termination of your employment at Columbia University.

McGrady mailed the letter to Cornell and she acknowledges receipt on January 29, 1974. (A.23)

It is well established that an employer's offer of reinstatement to a discriminatorily discharged employee must be an offer without an unlawful condition. An offer of reinstatement may be found to be unlawfully conditional on the basis of direct or circumstantial evidence. The Board cites Ridgely Manufacturing Company v. NLRB, 510 F. 2d 185, 188 (C.A.D.C. 1975) in support of its contention that McGrady's letter to Cornell is a conditional offer. Contrary to the Board, Columbia submits that (a) Cornell was not discriminatorily discharged or suspended prior to McGrady's

letter, (b) the letter does not on its face impose an unlawful condition upon reinstatement and (c) should not be construed to impose any unlawful condition under the circumstances of this case.

There are two important distinctions between the instant case and Ridgely Manufacturing, supra.

First, the employer in Ridgely was "riddled with labor violations." The Court in Ridgely sets out in footnote 1, 510 F. 2d at 186, five (5) prior cases of blatantly unlawful conduct by the employer and its affiliate in addition to the case under consideration by the Ridgely Court. A reading of the Board cases themselves, 207 NLRB 83 and 207 NLRB 193, shows that the employer in Ridgely was guilty of egregious conduct in discharging a total of seven employees and in other independent violations of the Act including unlawful interrogation of employees, threats and withholding of wage increases. The Ridgely employer also engaged in dilitory and disruptive tactics in the proceedings before the Board. Against this background, there is ample justification for the Board's finding in Ridgely that the offer of reinstatement made to employee Durban was conditioned upon Durban's agreement to refrain from the very union activities for which he had been discharged. None of this type of background is present in the instant case to warrant the inference

that McGrady's letter contains a latent unlawful condition. On the contrary, the instant case is unique in the fact that there is no other alleged unlawful conduct by Columbia beyond the alleged discharge itself.

Second, the Court should reject the Board's inference because it is clear that immediately prior to the letter Columbia afforded both Hirschfeld and Cornell the opportunity to present grievances through concerted action, consistent with Columbia's general policy on this subject both with respect to employees represented by a labor organization and employees not represented by a labor organization.

Cornell testified that when she and Hirschfeld met with McGrady on January 23, Cornell asked McGrady "If you're letting me stay here now as Muriel's witness, why on earth have I been fired?" (A.100) The answer is that Cornell was not fired for acting as Hirschfeld's witness, as McGrady's and McKeever's treatment of her and Hirschfeld shows. For the same reason, this Court should reject the finding that McGrady's letter imposes by implication an unlawful condition upon reinstatement.

POINT XI

ASSUMING ARGUENDO THAT THE BOARD'S ORDER SHOULD BE ENFORCED, IT SHOULD BE MODIFIED BECAUSE IT IS TOO BROAD

The Board's Decision finds Columbia guilty of a single violation of the Act, namely, the unlawful discharge of Cornell. This in itself is highly unusual. In virtually all other Board proceedings involving discharge cases, the employer is found guilty of other independent violations of the Act, usually unlawful threats or promises or interrogation of employees.

The Board order requires Columbia to offer to reinstate Cornell to her employment and to make her whole for any loss of pay she may have suffered by virtue of the alleged discrimination against her. The Board's Order also contains a broad cease and desist provision, as follows:

> "In any other manner interfering with, restraining, or coercing its employees in the exercise of their rights to self-organization, to form labor organizations, to join or assist any labor organization, to bargain collectively with representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities."

This cease and desist provision is far too broad in the circumstances of this case. There is no evidence that in discharging Cornell Lawton was effectuating any policy or practice of Columbia which was intended to or did interfere with, restrain or coerce its employees in the exercise of rights guaranteed by the Act. On the contrary, the discharge is clearly shown to be an isolated response by a solitary supervisor in a personal confrontation with an aggressive employee who refused to follow the supervisor's directions to leave her office and return to work. It is also significant that the supervisor was relatively inexperienced in her supervisory role and cannot be said to be an executive or officer of Columbia. Under these circumstances, this Court should not issue a cease and desist order as requested by the Board since such an order could theoretically be argued as the basis for a contempt proceeding in the event of any future dispute. The Court should not in the exercise of its discretion subject Columbia to this possibility on the record in this case.

Columbia requests that the paragraph cited above be deleted from the cease and desist order in its entirety.

Columbia further requests that the Court delete from the affirmative action portion of the Board's Order the requirement

that Columbia post a notice with respect to this case. This is an embarrassment to Columbia which is wholly out of proportion to the University's actual participation in the discharge, apart from its legal responsibility for Lawton's acts. The alleged unlawful action will be totally rectified by an offer of reinstatement and effectuation of the "make whole" provision. In the event that Columbia is ordered to post a notice, the broad cease and desist language should be deleted from the notice. NLRB v. Ampex Corp., 442 F. 2d 82 (7th Cir. 1971)

CONCLUSION

The Board's Order should not be enforced. If enforced, it should be modified as set forth in Point XI of this Brief.

Respectfully submitted,
PUTNEY, TWOMBLY, HALL & HIRSON, ESQS.

BY_____

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CERTIFICATE

In accordance with Rule 28 of the Rules of the United States Court of Appeals for the Second Circuit, I hereby certify that I have this 30th day of January, 1976, filed the required copies of the Brief of Respondent in the Clerk's Office, and have mailed the required copies of the Brief of Respondent to Elliott Moore, Deputy Associate General Counsel, National Labor Relations Board, Office of the General Counsel, Washington, D.C. 20570, attention Robert G. Sewell.

WILLIAM G. THAYER

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD, Petitioner,	)	
v.	)	No. 75-4155
COLUMBIA UNIVERSITY, Respondent.	)	

CERTIFICATE OF SERVICE

The undersigned certifies that three (3) copies of the Respondent's offset printed brief in the above-captioned case has this day been served by first class mail upon the following counsel at the address listed below:

Elliott Moore, Deputy Associate
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National Labor Relations Board
Office of the General Counsel
Washington, D.C. 20570
Attn: Robert G. Sewell

Dated at Washington, D.C.
this 26th day of March, 1976.

Carol Isser

CAROL ISSER
Notary Public, State of New York
No. 41-4606541
Qualified in Queens County
Certificate filed in New York County
Commission Expres March 30, 1977

PUTNEY, TWOMBLY, HALL & HIRSON

By William G. Thayer
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